BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	CC Docket No. 98-147

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby submit these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM"), released by the Federal Communications Commission ("FCC") on August 21, 2003, in the above-captioned dockets. In the FPRM, the FCC seeks comment on its proposal to modify the "pick and choose" rule adopted pursuant to section 251(i) of the Telecommunications Act of 1996 ("1996 Act"). Under this rule, a competitive carrier is permitted to opt into individual portions of a previously approved interconnection agreement between the incumbent

local exchange carrier ("ILEC") and another competitive local exchange carrier ("CLEC") in lieu of adopting the agreement in its entirety. The FCC proposes instead to allow a CLEC to pick and choose individual provisions of a standardized interconnection agreement which the ILEC has submitted to a state commission for its review and approval. The standardized agreement would contain minimum terms and conditions of interconnection that could then be customized by a CLEC and ILEC in an individual interconnection agreement. In the alternative, a CLEC could adopt in its entirety an existing interconnection agreement between another CLEC and ILEC. In the event that an ILEC does not file and obtain state approval for a standardized agreement, the current pick and choose rule would continue to apply. The FCC further seeks comment on whether its new pick and choose rules should be applied retroactively to all existing interconnection agreements.

The FCC issued its proposal to modify the pick and choose rule in response to a petition filed by Mpower Communications, a CLEC, which claimed that the existing pick and choose rule led to "a great sameness and very little meaningful choice" in interconnection agreements. FNPRM, ¶ 717. Mpower offered a proposal of its own that it believed would overcome this concern. In commenting on Mpower's petition, the ILECs resurrected their argument that the current pick and choose rule was unfair, even though the United States Supreme Court in AT&T v. Iowa Utils. Board, 525 U.S. 366, 396 (1999) upheld the existing rule as "the most readily apparent" reading of the 1996 Act. Most CLECs favor the continuance of the existing rule.

In requesting comment on its own proposal, the FCC tentatively concludes that the current pick and choose rule discourages the type of give and take in negotiations that Congress envisioned. FNPRM, ¶ 722. The FCC, however, asks for comment on the extent to which the current rule impedes meaningful negotiations between the CLEC and ILEC. Id.

The CPUC does not believe that modification of the existing pick and choose rule is warranted at this time. Since the implementation of the 1996 Act, in California's experience, the current pick and choose rule has worked quite well in providing the incentive and impetus for CLECs to enter into interconnection agreements with an ILEC in order to compete in local markets. Over 320 interconnection agreements between CLECs and the ILEC have been filed with the CPUC over the last seven years. Of these, over 98 percent are the result of voluntary negotiations between the parties. Thus, far from impeding meaningful negotiations, which is the tentative basis for the FCC's proposal but on which the FCC seeks further comment, the current pick and choose rule has greatly facilitated the entry of CLECs into the local exchange market in California. Moreover, the fact that the current pick and choose rule has enabled CLECs to smoothly and quickly enter into interconnection agreements with the ILEC in California was persuasive evidence, among other factors, in support of the CPUC's finding that SBC had satisfied the requirements of section 271 of the Act to enter the long distance market.

In addition, while the CPUC has arbitrated interconnection disputes between CLECs and the ILEC, in no case has a CLEC ever complained that the current pick and

choose rule was ineffective or should otherwise be modified. To the contrary, the existing pick and choose rule has enabled smaller carriers to avoid the cost of negotiation and/or arbitration, which in many cases is prohibitively expensive for them. See, e.g., Comments of Z-Tel to Mpower Petition. These carriers generally opt into a larger carrier's agreement and then pick and choose one or two provisions from other agreements without having to incur the significant cost of negotiation or arbitration.

In contrast, under the FCC's proposal, smaller carriers are unlikely to opt into an existing interconnection agreement in its entirety. As the FCC itself acknowledged, "few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans." Local Competition Order, ¶ 1312. The FCC further observed that the ILEC would have the incentive and ability to tailor individual contracts in a way that other CLECs would find unattractive. Id., ¶ 1316.[1]

Instead, smaller carriers would likely adopt the "one-size-fits-all" standardized agreement, and then be compelled to incur the substantial cost of negotiation and/or arbitration for the customized provisions that they would require. As a practical matter, many smaller customers which cannot afford the cost of negotiation or arbitration will be forced to accept agreements negotiated by larger carriers that are operationally very different, leaving the smaller carriers at a competitive disadvantage. Indeed, the FCC

[1] See also id. at ¶ 1312: "[F]ailure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement."

itself acknowledges that its proposal will likely impose additional burdens on smaller CLECs that could detrimentally affect their ability to compete. FNPRM, ¶ 825.

Further, as a practical matter, the FCC's proposal imposes additional burdens on the state that are not outweighed by the proposal's perceived benefits. The FCC's proposal entails state review and approval of a standardized interconnection agreement tendered by an ILEC. This will be no simple task for the states. The CPUC will be required to conduct a formal proceeding to iron out the numerous issues between the hundreds of CLECs and the ILEC. These issues will be highly contentious, and undoubtedly will result in a long and protracted proceeding. At the same time that the CPUC will be required to devote significant time and resources to this proceeding, it will be conducting proceedings to implement the FCC's Triennial Review Order ("TRO"), and responding to the FCC's TELRIC rulemaking. These latter proceedings are two of the most significant actions the FCC has undertaken most recently in its effort to implement key provisions of the 1996 Act, and will require the CPUC's considerable and careful attention. On balance then, given the CPUC's limited and scarce resources and the importance of the TRO and TELRIC proceedings, the CPUC respectfully submits that it makes little sense to require states to divert resources to modify a rule that is not broken, and in fact, has worked remarkably well in California to foster competition. The CPUC therefore urges the FCC to retain the existing pick and choose rule at this time.

In short, California's experience is that the current pick and choose rule has worked well by greatly facilitating the entry of competitors, and particularly smaller

CLECs, into local markets, as Congress intended under the 1996 Act. There is no need to modify the existing rule in favor of one that will additionally and detrimentally burden both smaller CLECs and the states.

Respectfully submitted,

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